INDEX

CASES CITED

STATUTES CITED

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

FRED P. WEISSMAN COMPANY,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals for the Sixth Circuit

To the Hon. Fred M. Vinson, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

STATEMENT

The petitioner, Fred P. Weissman Company, a corporation, does hereby petition this Court for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit entered on the 29th day of November, 1948, pursuant to written opinion filed on said date. This opinion is reported in 170 Fed. (2d) page 952 January 17, 1949, Adv. Sheets, and its Docket number on the records of said Court of Appeals is 10,535.

1. Petitioner, Fred P. Weissman Company, is a corporation engaged in the manufacture of women's coats at its plant near Harrodsburg, Mercer County, Kentucky.

The alleged unfair labor practices occurred within the Sixth Judicial Circuit of the United States and the Court of Appeals for the Sixth Circuit has jurisdiction by virtue of Sec. 10(e) of the National Labor Relations Act.

2. Respondent, National Labor Relations Board, is an agency of the United States created by an Act of Congress July 5, 1935, c. 372, 74th Cong. 1st Session (29 USCA sec. 151, et. seq.) and as amended by an Act of Congress June 23, 1947, c. 120, 80th Cong. 1st Session (29 USCA—1948 CAPP, sec. 151, et. seq.)

3. Respondent, National Labor Relations Board, on August 28, 1947, filed its petition in the United States Circuit Court of Appeals for the Sixth Circuit, seeking enforcement of its order, directing petitioner to cease and desist from discouraging membership in International Ladies Garment Union or any other labor organization of its employees; discharging or otherwise discriminating against any of its employees because they had testified under the Act, and to take other steps as directed by said order which appear at page 2 of the Transcript of Record herein, including an offer to Mildred Purdon Sims of immediate and full reinstatement to her former, or substantially equivalent, position and make her whole for any loss of pay she may have suffered by reason of the alleged discrimination against her.

4. On November 29, 1948, said Court of Appeals entered a decree which recited that "it is now ordered, adjudged and decreed by this Court that the decree of the National Labor Relations Board be, and the same is enforced."

On December 20, 1948, petitioner filed its petition for rehearing and on January 3, 1949, said petition was de-

nied. On January 24, 1949, said Court of Appeals entered an order staying mandate in this action sixty days from said date pending application of petitioner to the Supreme Court of the United States for Writ of Certiorari and further providing that if said application is made within sixty days, the said stay shall operate until final disposition of this case in the Supreme Court.

REASONS FOR THE ALLOWANCE OF THE WRIT

The Court of Appeals for the Sixth Circuit has decided the following important question arising under federal law, to-wit: National Labor Relations Act, which has not been, but should be, clearly settled by the Supreme Court of the United States: Where an employee, without knowledge on the part of employer, is excluded from a plant by the wholly voluntary action of a large group of fellow employees who strenuously oppose said employee's reinstatement, what affirmative duty, if any, does the employer owe employee under National Labor Relations Act.

It is submitted that the question herein presented by your petitioner for Writ of Certiorari is of sufficient importance to be reviewed by this Court.

PRAYER FOR WRIT

WHEREFORE, your petitioner respectfully prays that a Writ of Certiorari issue directed to the United States Court of Appeals for the Sixth Circuit commanding said Court to certify and send to this Court a full and complete Transcript of the Record and of the proceedings of said Court of Appeals had in the above-styled action; that said action be reviewed and determined by this Court as provided by the statutes of the United States and that the decree of said Court of Appeals herein be re-

versed by this Court and for such further relief as the Court may deem proper.

Dated: Lexington, Kentucky. March 12, 1949.

FRED P. WEISSMAN COMPANY,
Petitioner,

By RICHARD C. STOLL,
Counsel for Petitioner.

STOLL, KEENON & PARK,
602 Bank of Commerce Bldg.,
Lexington, Kentucky,
Of Counsel.

IN THE

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OCTOBER TERM, 1948

FRED P. WEISSMAN COMPANY,
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v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

We have already set out in the petition a statement of the grounds on which the jurisdiction of this Court is invoked and have specified the error claimed by the petitioner.

STATEMENT

We shall now briefly relate the particular facts of this case which we believe to be material to the consideration of the question presented.

The present case is a small branch of a companion action, Court of Appeals Docket 10,536, also now before this Court on a like petition between the same parties, both of which were argued and submitted together and decided in one opinion by the Court of Appeals.

Mildred Purdon Sims was employed by petitioner in the finishing department of its plant in Mercer County, Kentucky, from April, 1945, until March, 1946. A short

time after Union leaders followed Weissman from Lawrenceburg, Indiana, to Harrodsburg, Kentucky, as more fully related in our brief in said companion case No. 10,536, Sims and four other women employees of the Weissman plant became sympathizers with and, perhaps, actual participants in the Union activities against Weissman. In September, 1945, a large group of women employees who had become incensed at the outrageous efforts to drive Weissman out of Harrodsburg and alarmed at the fact that this effort, if successful, would cost them their jobs, forcibly excluded the other four girls from the plant. On March 7, 1946, they notified Sims not to come back to work. However, Sims did return to the plant on the following day, without molestation, and obtained her pay check. At her request, she also received a refund on her deposit and she never thereafter at any time presented herself at the plant to go to work. In fact, there is nothing anywhere in the record that Sims ever at any time actually desired re-employment, unless such inferenece may be drawn from the fact that an organizer of the Union undertook to intercede in her behalf after the date upon which she left the plant.

Later a proceeding for her reinstatement at the Weissman plant was brought before the National Labor Relations Board and, as stated in the petition herein, the Board found that petitioner had committed an unfair labor practice in failing to offer Sims reinstatement at the plant and her reinstatement was ordered. This decree was affirmed by the Court of Appeals in the instant case.

ARGUMENT

We shall, as concisely as possible, under this heading attempt to state our argument in support of our contention with respect to the error assigned.

The testimony taken at the hearing in this particular case may be found at page 38, et. seq. of Transcript of Record herein, and further facts shedding light upon the circumstances surrounding this case are set out at pages 301, 307-308, 310, 317-318, 356, 358, 394, 457-458 of the Transcript of Record of the companion case, No. 10,536, now before this Court.

As the statement of facts show and as the evidence in this case and the companion case, cited above, proves, Sims incurred the almost unanimous enmity of the employees of the Weissman plant by reason of her association with the persons who proclaimed both orally and in writing that they proposed to drive Weissman out of Harrodsburg and close his plant. The employees of this plant earning high wages did not need to remind themselves that before Weissman came to Harrodsburg most of them had been wholly unemployed.

As a matter of self-preservation, they were deeply concerned in protecting their own jobs. What happened is a natural reaction of human nature. If the Union leaders and their friends, which consisted almost exclusively of Sims and four other women employees, were trying to dry up their livelihood at its source by the ruining of Weissman, then they would take vigorous counteraction themselves. And they did. They got rid of the four women employees and then got rid of Sims. There is not the slightest evidence that Weissman or any person connected with him to any extent whatsoever took any part

in or even had any knowledge of the expulsion of the Sims girl until it had happened.

What should Weissman have done with reference to the reinstatement of Sims? Uncontradicted statements in the Transcript of Record show that a desire for harmony in the plant and not Union affiliation was the cause of Weissman's refusal to reinstate. (Transcript 78).

The Board held, as did the Court of Appeals, that Weissman was required to reinstate this employee under the decisions of the *National Labor Relations Board* v. *Hudson Motor Car Company*, 128 Fed. (2d) 528, and *National Labor Relations Board* v. *General Motors Corp.*, 116 Fed. (2d) 306, both from the Seventh Circuit, and *Clover Fork Coal Co.* v. *National Labor Relations Board*, 97 Fed. (2d) 331 from the Sixth Circuit. These decisions seem to sustain the harsh and unworkable rule that an employer, who has had no part in an argument or a state of feeling existing between an employee and practically all of the other employees of a plant, must take the part of the single employee and protect the employment of such employee even though—by so doing—he will create much greater and more bitter dissention and controversy in his organization, perhaps, to the utter and complete disruption of the plant itself. Despite the fact, as admitted here, the employer's sole desire is for harmony in the operation of his business, he must incur the enmity of many in order that he may earn the approval of one!

CONCLUSION

We do not believe that this Court will approve such an untenable position, but that this Court will agree that the question of the extent to which an employer must go in

order to reinstate an employee who has lost a job through no fault whatever on the part of the employer, is one that has not yet been decided by the Supreme Court and that it is of such vital consequence that it should be definitely and finally decided in this case.

For the foregoing reason we urge upon this Court that the Writ of Certiorari prayed for in the petition herein be granted.

Respectfully submitted,

FRED P. WEISSMAN COMPANY,
Petitioner,

By RICHARD C. STOLL,
Counsel for Petitioner.

STOLL, KEENON & PARK,
602 Bank of Commerce Building,
Lexington, Kentucky,
Of Counsel.

INDEX

AUTHORITIES CITED

834053—49

In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 678

FRED P. WEISSMAN COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINION BELOW

The opinion of the court below (R. 84–89) is reported in 170 F. 2d 952. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 34–37) are reported in 71 N. L. R. B. 147.

JURISDICTION

The decree of the court below was entered on November 29, 1948 (R. 83). The Company's petition for rehearing was denied on January 3, 1949 (R. 93). The jurisdiction of this Court was invoked under Section 1254 of 28 U. S. C. 1254, as codified June 25, 1948, and Section 10 (e) of the National Labor Relations Act, as amended.

QUESTION PRESENTED

Whether the Board properly determined that the Company violated Sections 8 (1), (3) and (4) of the Act, where, following a series of exclusions of union members from the plant by anti-union employees assisted by supervisors, the Company permitted an employee, who testified before the Board in proceedings to investigate such exclusions, to be evicted from the plant by the anti-union employees and denied her reinstatement upon her demand.

STATUTES INVOLVED

The pertinent provisions of the National Labor Relations Act (49 Stat. 449, 29 U. S. C. 151, *et seq.*), and of the Labor Management Relations Act of 1947 (61 Stat. 136, 29 U. S. C., Supp. I, 141, *et seq.*) are set forth in the Appendix, *infra*, pp. 9–10.

STATEMENT

Upon the usual proceedings under Section 10 of the National Labor Relations Act, the Board on September 30, 1946, issued its findings of fact, conclusions of law, and order (R. 34–37). The pertinent facts as found by the Board, may be summarized as follows:

This case is a sequel to a companion case, also now before this Court on a similar petition, and entitled *Fred P. Weissman* v. *National Labor Relations Board,* Case No. 677, this Term. Both cases were argued and submitted together to the

court below, and decided in one opinion (R. 84–89).

As shown in the Board's brief in No. 677 (pp. 4–6), between September 19 and October 29, 1945, the petitioner's predecessor, Fred P. Weissman, d/b/a Fred P. Weissman Company, through its officials and supervisors, participated and acquiesced in the discriminatory exclusion from its plant of five employees, members of the International Ladies' Garment Workers Union, A. F. of L., herein called the Union, by an anti-Union group of employees. Employee Sims witnessed the exclusion of these employees on September 19 (R. 18; 45–46).

On February 20, 1946, at the hearing of the above companion case before the trial examiner, Sims testified with respect to the aforementioned exclusion incident as a witness for the Board (R. 19; 50–51). That hearing was concluded on March 6 (R. 19; 44), and on the next day, as Sims left the plant, she was confronted by an anti-Union group of employees, comprising substantially the same girls who had participated in the prior exclusions (R. 19; 51–52), and was told that "her services were no longer needed and that * * * [she] needn't come back in the morning * * * because [she] couldn't get in" (R. 19–20; 51). Sims did not report for work the next morning, Friday, March 8 (R. 20; 52), but on the afternoon of March 11, and thereafter, she made repeated efforts, thwarted to a large

extent by petitioner's procrastination, to contact petitioner's officers and managers to advise them how she had been excluded from the plant, and that she had not quit work and desired reinstatement (R. 20–22; 52–54, 56–59, 63–64, 66–70, 82). Petitioner was advised both over the telephone and by letter of the circumstances of Sim's exclusion (R. 21–22; 56–59, 82), but petitioner took the position that it would not reinstate her without an order from the Board (R. 22–23; 73–74).

Upon these facts, the Board determined that petitioner was responsible for Sims' exclusion from the plant (R. 24–26, 34). The Board found that the petitioner's failure to repudiate the earlier exclusions and its refusal to reinstate the excluded employees, encouraged the anti-Union employees in their determination to exclude Union adherents from the plant and in ultimately evicting Sims from the plant (R. 24–25, 34–35). It found further that the incidents in the earlier case showed that petitioner manifested an attitude of hostility to the Union, of which the anti-Union employees were aware (R. 25). It pointed out that petitioner was under an affirmative duty to control the tenure of its employees and not to delegate its power of discharge to any union or anti-Union group of employees, a duty which it violated by relinquishing control of Sims' admission to the plant to an anti-Union group of employees (R. 25, 34–35). The Board accordingly found that petitioner violated Section 8 (1),

(3) and (4) of the Act by permitting the eviction of Sims because of her adherence to the Union, and because she had testified at the Board hearing in the earlier case (R. 25–26, 34–35). It ordered the petitioner to cease and desist from its unfair labor practices, to instruct its employees it will not permit such exclusions from its plant, to reinstate Sims with back pay and to post appropriate notices (R. 35–37).

On August 28, 1947, the Board filed a petition for enforcement of its order in the court below (R. 1–5), and on November 29, 1948, the court handed down its opinion sustaining the Board's order in full, and entered its decree of enforcement (R. 83–89).

ARGUMENT

The instant case presents only a question of whether the evidence was sufficient to establish that petitioner was responsible for the loss to Sims of her job at petitioner's plant which followed her union activities and testimony before the Board. It thus presents no issue justifying review by this Court.

Petitioner contends that (1) inasmuch as none of its officials participated in, or even had knowledge of the exclusion of Sims until after it occurred, it bears no responsibility therefor, and (2) the preservation of harmonious labor relations at the plant relieved it of any obligation to refrain from discriminating against Sims, as provided in Section 8 (3) of the Act, and justified

both its condonation of Sim's exclusion from the plant, and its refusal to reinstate her.

1. The exclusion of Sims in the instant case, as the Board found (R. 24–25, 34–35), was a continuation of the pattern of discrimination practiced by petitioner and its predecessor, resulting from their own hostility to the Union and from their failure and refusal to take any remedial or precautionary measures to prevent the recurrence of any exclusions following those perpetrated during September and October by the anti-Union group of employees. Clearly, the exclusion of Sims followed as a result of petitioner's failure to fulfill its duty under the Act to afford reasonable protection to its Union-member employees against disorderly conduct and ouster from their jobs at the hands of the anti-Union employee group. Having failed to sustain its statutory obligation in this respect, petitioner is liable for the consequences regardless of whether or not its representatives were directly involved in Sims' exclusion from the plant. In addition, as the Board further found (R. 23–24), petitioner refused to grant Sims' request for reinstatement after being apprised of her exclusion. Consequently, petitioner can not seriously contend even a lack of knowledge as a defense with respect to this phase of its alleged discrimination. *National Labor Relations Board* v. *Hudson Motor Car Co.*, 128 F. 2d 528, 532–533 (C. A. 6); *Clover Fork Coal Co.* v. *National Labor Relations Board*, 97 F. 2d

331 (C. A. 6); *National Labor Relations Board* v. *General Motors Corp.*, 116 F. 2d 306, 309–310, 311 (C. A. 7); *Matter of Detroit Gasket & Manufacturing Company*, 78 N. L. R. B., No. 83.

Upon these considerations the Board was warranted in finding, as it did (R. 24–25), "that respondent's [petitioner's] failure to repudiate the acts of these [anti-union] employees in excluding the union employees, following the original exclusions, on September 19, and its refusal to reinstate them thereafter upon demand, encouraged the anti-union employees in persisting in their determination to exclude union adherents from the plant, and in ultimately evicting Sims from the plant, just as they had excluded the others on September 20 and October 29."

2. Petitioner also takes the position that since Sims' difficulties arose out of an argument between her and a large number of anti-Union employees concerning the Union, it might have been better for her to go than to have made a great number of other employees dissatisfied (R. 79–80). As the above argument and cited cases demonstrate, the requirements of the Act preclude petitioner from taking the position that the preservation of harmonious labor relations among its employees justified its refusal to reinstate Sims. Thus, the Board properly found that petitioner discriminated against Sims in violation of Section 8 (3) of the Act (R. 25), and assumed responsibility for the consequences. Since, as

the Board found, the discrimination against Sims was caused in part because she had given testimony under the Act, it follows that the discrimination also constituted a violation of Section 8 (4) of the Act (R. 26).

The contention that the decision of the court below imposes a harsh and unworkable rule is without merit. Petitioner seeks a rule permitting it to substitute its judgment based upon its own interests in derogation of those requirements of the Act which protect the rights of employees. There is, accordingly, no valid reason why petitioner should be relieved of the obligations flowing from its failure to act as required by law.

CONCLUSION

The decision below, sustaining the Board's findings and order, is correct and presents no issues warranting review. The petition for a writ of certiorari should be denied.

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General.

ROBERT N. DENHAM,
General Counsel,

DAVID P. FINDLING,
Associate General Counsel,

RUTH WEYAND,
Assistant General Counsel,

WILLIAM W. KAPELL,
Attorney,
National Labor Relations Board.

APRIL 1949.

APPENDIX

1. The relevant provisions of the National Labor Relations Act (Act of July 5, 1935, 49 Stat. 449, 29 U. S. C. 151, *et seq.*) are as follows:

* * * * *

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

* * * * *

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *

* * * * *

(4) To discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act.

* * * * *

SEC. 10 (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor

practice (listed in section 8) affecting commerce. * * *

* * * * *

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. I, 141, *et seq.*) are as follows:

* * * * *

SEC. 10. * * *

* * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States * * * within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order * * * and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power * * * to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. * * * The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *

* * * * *

U. S. GOVERNMENT PRINTING OFFICE: 1949